United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2290

To be argued by
ELLIOT G. SAGOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND ROSNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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FOR THE SECOND CIRCUIT

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND ROSNER,

Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Edmund Rosner appeals from an order entered in the United States District Court for the Southern District of New York on August 15, 1974 by the Honorable Arnold Bauman, United States District Judge, denying his third motion for a new trial based on newly discovered evidence.

On December 5, 1972, after an eleven day trial, Rosner was found guilty of conspiracy, obstruction of justice, and three counts of bribery. After hearings on two separate motions for a new trial, Rosner was sentenced on March 20, 1973 to five years imprisonment. On September 26, 1973, the conviction was affirmed, sentence was vacated, and the case was remanded* for resentencing. *United*

* However, the mandate did not issue to the District Court pending Rosner's application for a writ of *certiorari*.

States v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973). On March 20, 1974, while his application for *certiorari* was pending, Rosner moved in the District Court for a new trial based on newly discovered evidence that the principal Government witness against Rosner, Robert Leuci, an admittedly corrupt police officer, had lied at trial about the extent of his (Leuci's) crimes, and that the Government suppressed evidence of this. On June 10, 1974, after being informed by the Solicitor General of Leuci's perjury at Rosner's trial in concealing his criminal activities, the Supreme Court denied Rosner's application for a writ of *certiorari* without prejudice to the District Court to consider the motion for a new trial. 42 U.S.L.W. 3679.

In July, 1974 Judge Bauman held a hearing on Rosner's new trial motion of March 20, and denied the motion in a 31-page opinion on August 15, 1974 (A. 1288-1318).* On August 16, 1974, the Honorable Inzer B. Wyatt, United States District Judge, resentenced Rosner to concurrent terms of three years imprisonment on each count. He is free on bail pending this appeal.

Statement of Facts and Proceedings Below

The Government's proof at trial, based on conversations between Leuci and Rosner, DeStefano and Lamattina, some of which were tape recorded, and corroborated in part by Rosner's admissions from the witness stand, established that Rosner was involved in making three bribe

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* "A." refers to Appellant's Appendix; "Tr." refers to the transcript of trial; "Op." refers to Judge Bauman's opinion dated August 15, 1974 which is found at A. 1288-1318. "App. Br." refers to Appellant's Brief, and "Gov. Br. Dir. App." refers to the Government's brief on Rosner's direct appeal. "A. Dir. App." refers to Appellant's Appendix of his direct appeal. "GX." and "H. GX." refer to Government exhibits introduced at the trial and hearing respectively.

payments totaling $2,350 to Robert Leuci of the New York City Police Department in return for Section 3500 and grand jury testimony in a criminal case then pending against Rosner. The proof also established, as the indictment charged in Counts One and Two, that Rosner obstructed justice in his attempt to obtain secret information in unrelated matters before the District Court, *viz.*, the Martinez-Marcone grand jury investigation and information "whether his own client, Stewart, a witness in a separate case,* was a Government informer." *United States* v. *Rosner, supra,* 485 F.2d at 1221. Rosner conceded that he had made illegal payments to Leuci for the 3500 material and the Grand Jury minutes but claimed he had been entrapped by pressure from Leuci, Lamattina and DeStefano. A full statement of the facts is found in this Court's opinion on Rosner's direct appeal, *United States* v. *Rosner, supra,* and in the Government's brief to this Court on that appeal (Gov. Br. Dir. App., pp. 1-19).

While Rosner's petition for *certiorari* was pending in the Supreme Court, on April 17, 1974, Leuci revealed for the first time to the Government that he had committed many more crimes than he had previously admitted to at the Rosner trial.** On April 23, 1974 the United States Attorney's Office informed Judge Bauman by letter that Leuci had made these revelations and informed the Solicitor General's office on April 30, 1974. After the Supreme Court denied Rosner's application for *certiorari* on June 10, Judge Bauman conducted a hearing in July 1974.

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* Indictment 71 Cr. 1199, *United States* v. *Bynum,* 485 F.2d 490 (2d Cir. 1973), *vacated and remanded on other grounds,* 42 U.S.L.W. 3646 (May 28, 1974).

** Leuci's revelations on April 17, 1974 about his additional crimes came about because of an investigation which was conducted by the United States Attorneys for the Southern and Eastern Districts concerning a unit of the New York City Police Department where Detective Leuci had been assigned (A. 396-407).

At Rosner's trial Leuci on direct examination admitted committing various crimes arising out of four incidents which involved his receipt of approximately $6,000 from the subjects of investigations to whom Leuci or others sold official information (Tr. 163-64a, 345-62, Op. 3-4, A. Dir. App. 23-25).* Furthermore, at trial Leuci was questioned extensively about the fact that there were allegations in the Police Department files against him, including allegations involving the transfer of narcotics, but he denied them (Tr. 376-384). Leuci testified that he did not expect to be prosecuted for his prior crimes (Tr. 396). Defense counsel at trial told the jury that Leuci was an expert in "blackmail" (Tr. 1249) and referred to him as "corruption himself" (Tr. 100).

At the hearing in July, 1974, on Rosner's new trial motion, Leuci was called by Rosner and admitted to many crimes as set forth below that he did not testify to at the *Rosner* trial (see Op. 4):

1. On fifteen occasions Leuci shared in money seized in arrests;

2. Leuci distributed small quantities of heroin ($5.00 bags retained from seizures) to his informants for their personal use (A. 424-26, 431). Except for giving one ounce of heroin to Richard Lawrence on one occasion** and one pound of marijuana to

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* Thus the jury had before it the fact that Leuci had himself committed "crimes as serious as those charged against [Rosner]." Supplemental Memorandum of the Solicitor General, p. 8 (hereinafter "Supp. Memo.").

** Rosner's March 20, 1974 motion appended the affidavit of Lawrence, a/k/a the Baron, an informant of Leuci's and at various times for the then Bureau of Narcotics and Dangerous Drugs as well as others, who alleged that Leuci engaged in numerous narcotics transactions with him. Most of Lawrence's allegations were denied by Leuci. Rosner never called Lawrence to testify at the hearing.

an informant after an arrest on another occasion, Leuci denied ever giving narcotics to persons other than his "junkie" informants and testified that he never received money in return for drugs (A. 426, 436);*

3. Leuci conducted several illegal searches and engaged in illegal electronic surveillances;

4. Leuci accepted sums of money from two attorneys and gave money to an Assistant District Attorney on one occasion;

5. Leuci sold official information (see Op. 4 n. 7);

6. Leuci committed perjury at the *Rosner* trial where he limited the extent of his own past crimes.

In his decision denying the motion, Judge Bauman concluded that even if the *Rosner* jury had known all of Leuci's crimes there would not have been a different verdict because of Rosner's own admissions and because the tape recordings—not Leuci's credibility—were the "lynchpin" of the Government's case (Op. 12-13, 15). Judge Bauman stated in part (Op. 20):

"Leuci's credibility was not the crux of the government's case. The jury had before it the very best evidence of Rosner's criminality—the record of his own voice and words and the intonation made in the midst of his criminal activities. Thus,

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* Leuci had a different relationship with his informants who were small time street pushers but not users. He never gave them narcotics (A. 426), but he did admit that they periodically made payments to him (A. 438-39). He also stated that on one or two occasions when he did not have drugs to give his "junkie" informants, he would get bags from the street pusher informants to give them. He never paid the informants for the narcotics (A. 434). Leuci asserted that as a result of assistance provided by his informants he and his partner arrested 100 street pushers a year (A. 1146).

> even had the jury been fully apprised of Leuci's criminal background and his credibility diminished accordingly, I see no reasonable likelihood of a different jury verdict. For the tape recordings spoke far more decisively of Rosner's guilt than Leuci did."

Rosner also claimed, as he does on appeal, that the United States Attorney's Office engaged in four acts of suppression of evidence of *some* of Leuci's additional crimes, and that two acts of alleged suppression took place prior to trial and two occurred after trial. The first act of alleged suppression related to an undercover recording that Leuci made of Lawrence on March 29, 1971, which Rosner claims should have beeen made available to him prior to trial because it allegedly contains evidence of Leuci's narcotics transactions. Judge Bauman ruled that the Government had no duty to disclose this tape recording (discussed pp. 9-14, *infra*) because of its ambiguous nature and found no evidence of deliberate, considered suppression (Op. 14). The second alleged act of suppression concerned a piece of 3500 material (the Goe memorandum dated July 3, 1972) in which Leuci admitted that some time in late 1964 or early 1965 he kept $50 from money uncovered during a search. The document was discovered on April 9, 1974 by Assistant United States Attorney Sagor and the relevant portion turned over to Rosner before the hearing on his new trial motion. This document was not turned over to Rosner prior to trial, but Judge Bauman found that neither of the two Assistant United States Attorneys who tried the *Rosner* case was aware of it prior to trial, that "seen against the background of those other crimes to which Leuci had confessed, it had no real significance" and that the Government's failure to turn over the document was "inadvertent" (Op. 10-12). The third act of alleged suppression concerned post-trial allegations that Richard Lawrence, an informant, made against Leuci in January, 1973. Rosner

contends that the Government should have brought Lawrence's unsubstantiated allegations to Rosner's attention even though the United States Attorney's Office was unable to substantiate them and was informed that Lawrence had failed a polygraph examination regarding his allegations. Judge Bauman concluded that while the Government should have realized that the "information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in . . . [his first motion for a new trial alleging that Leuci lied as to the extent of prior misconduct]", there was no way that Rosner was prejudiced (Op. 22-23). Fourth and finally, Rosner charges that the United States Attorney's Office deliberately concealed the existence of the Goe Memorandum from the Solicitor General and the Supreme Court which, though informed of Leuci's post-trial admissions of substantial criminal activity and perjury at Rosner's trial would, Rosner claims, have granted him a new trial had it only known of the Goe Memorandum. In rejecting this argument, Judge Bauman found (Op. 25) that the Goe Memorandum was "trivial" compared to what the Supreme Court was informed of and that disclosure of it would not have changed the Supreme Court's action.

With the exception of the non-disclosure at trial of one insignificant piece of 3500 material, the record establishes that there have been no prosecutorial improprieties of any kind in this case nor any conduct which prejudiced Rosner's rights at any stage of these proceedings.* Although the Government will respond to each of Rosner's claims of

* It was the United States Attorney's Office which secured revelations of additional misconduct from Leuci on April 17 and brought Leuci's admissions to the attention of Judge Bauman by letter dated April 23, 1974, and to the attention of the Solicitor General on April 30, 1974. It was also the Government on its own which brought to Rosner's attention the existence of the Goe memorandum which contained Leuci's admission, prior to the trial, of the illegal receipt of $50.

misconduct in turn, it is clear that these extravagant, highly abstract and attenuated allegations are merely an attempt to divert attention from Rosner's inability to provide a reasonable explanation of how Leuci's additional admissions of misconduct would have had a significant impact on the jury's verdict. In the welter of accusations of prosecutorial misconduct, it is notable that none of the information Rosner seizes upon has anything whatsoever to do with the facts surrounding the crimes for which he was convicted.

ARGUMENT

POINT I

Rosner's motion for a new trial based on newly discovered evidence that the United States Attorney's office allegedly suppressed evidence was properly rejected by Judge Bauman after a full evidentiary hearing. The Government's failure to provide Rosner with Leuci's admission concerning $50 was negligible and inadvertent. The Government turned over to Rosner all other materials to which he was entitled.

Rosner charges that five Assistant United States Attorneys deliberately suppressed, both before and after trial, evidence of Leuci's commission of additional crimes.

Rosner's flamboyant allegations of "deliberate suppression" of Leuci's criminal conduct, "serious governmental misconduct," and "sordid episodes" are predicated upon exaggeration, distortion and omission of the facts and a misunderstanding of the governing legal principles.

1. Alleged Pretrial Suppression

A. The Leuci-Lawrence Tape

In February, 1971 Detective Leuci voluntarily went to the Knapp Commission to provide information about corruption in the New York City Police Department. Leuci met with Nicholas Scoppetta, then employed as an attorney for the Knapp Commission. During their sessions Scoppetta sought to motivate Leuci to understake an undercover investigation of the criminal justice system (A. 628-29). After a few sessions with Scoppetta, Leuci volunteered for this dangerous undercover assignment. It is clear that Leuci's decision to work with Scoppetta was not motivated by a fear of prosecution for his past conduct since this was unknown to the Commission and Scoppetta (A. 334-35).* Thereafter, Leuci began working under Scoppetta's guidance.

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* During Leuci's initial meetings with Scoppetta, Leuci agreed that some of their conversations would be recorded for Scoppetta's convenience so that he could review their contents at his leisure, but Leuci insisted upon the condition, consented to by Scoppetta, that the tapes be returned to him on demand (A. 631). In one recording Leuci volunteered to Scoppetta that he had engaged in the commission of crimes. (This February 1971 recording is not one of Rosner's grounds for appeal and is to be distinguished from the recording of March 29, 1971 which Leuci made of Lawrence; see also Gov. Post-Hearing Brief, pp. 12-19). At the hearing both Leuci and Scoppetta testified that only a brief portion of this *one* recorded conversation in early February pertained to Leuci's misconduct (A. 333-36, 622). The criminal activity admitted by Leuci related to his role as an intermediary in the sale of information in narcotics cases by police officers to prospective defendants. On the tape Leuci described one such instance in detail and explained that there were several others like it (A. 299-303, 622-26). All four instances were described in detail by Leuci at the trial (*see* Tr. 345-364). In June, 1971, acting upon Leuci's request (A. 348), Scoppetta, while he was still employed by the Knapp Commission, with Assistant United States Attorney Edward Shaw's consent, returned the tapes to Leuci, who thereupon destroyed them (A. 633). Before

[Footnote continued on following page]

In March, 1971, the Knapp Commission was investigating an allegation that Richard Lawrence, an informant for Leuci and other policemen, was involved in a homicide in the Bronx. Under the auspices of the Commission and at Scoppetta's direction Leuci was instructed to make a recording of Lawrence (A. 1270-73, 1280). On March 29, 1971, Leuci recorded Lawrence while they were riding in Leuci's automobile (A. 1235).

During the recorded conversation Lawrence denied participating in the homicide (A. 1271). Lawrence also spoke to Leuci about Lawrence's urgent need for money (A. 1210-11) and about Lawrence's knowledge of narcotics. The discussion in part also related to whether Detective Watson, a police officer who was under investigation for the Bronx homicide with Lawrence, sold Lawrence narcotics. Leuci as part of a "warming-up" process (A. 1255), tried to contrast himself to Watson, and the conversations were "intertwined". While Lawrence made admissions as to his own general involvement in narcotics dealings, Lawrence appeared to have specifically denied on the recording receiving narcotics from Leuci (A. 1194). The pertinent passage reads (Op. 28):

> "Leuci: Have we ever made a case where you didn't get a piece of the package? Lawrence: Have we ever made a case that I didn't get a piece of the package? Oh, man, I don't know what the hell you

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returning the tapes, however, Scoppetta prepared an accurate memorandum of the portions of recorded conversation pertaining to misconduct (*see* H. GX 5) (A. 632-33, 320-21). On November 10, 1972, prior to the trial, Assistant United States Attorney Robert Morvillo, Chief of the Criminal Division and the chief prosecutor in the *Rosner* case informed Rosner's counsel of the destruction of the tapes and the existence of the memorandum. The defense counsel was provided with the Scoppetta memorandum, and Leuci was made available for interview. The Government asked Leuci questions about the tape at trial (Tr. 340, 343-44, 656; Court's Exhibit 4 at trial, reproduced in Exhibit A of Government's Affidavit of April 9, 1973).

talkin' about. I don't know what you talkin' about. Have we ever made a case that I didn't get a piece of the pack . . .? Hell, we've made a whole lot of cases that I didn't get a piece of the package. I don't know what the hell you talkin' about. Shit! That . . . that . . . that . . . if that was the case, I'd've been straight now. . . ."

Leuci, who had made the recording alone, turned it over to another agent of the Knapp Commission on the following day (A. 1235-38). Shortly thereafter, Leuci briefed Scoppetta concerning the recording, and Scoppetta listened to the recording (A. 1239, 1270). This recording, along with other undercover recordings involving other subjects, was brought by Scoppetta to the United States Attorney's Office when he left the Knapp Commission and was appointed a Special Assistant United States Attorney on July 1, 1971 (A. 1273).* During the period from February 1971 through June 15, 1972, when Leuci's undercover rule was prematurely revealed by the New York Times and the Daily News (Gov. Br. Dir. App. 34), Leuci made over two hundred recordings (A. 1274).

In January, 1973, after the *Rosner* trial, when Lawrence's allegations concerning Leuci came to Leuci's attention, see pages 19-29, *infra*, he told Assistant United States Attorney Morvillo, Chief of the Criminal Division, that the March, 1971, undercover tape of Lawrence controverted Lawrence's allegations. This was the first time that any of the prosecutors who tried the *Rosner* case knew of the existence of this tape (A. 1243, 1252, 1281). It was stipulated that the tape recording was one of the many "factors" upon which Morvillo relied in concluding that the substance of Lawrence's January 1973, allegations were false (A. 1281-83).

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* Mr. Scoppetta is presently Commissioner of Investigations of the City of New York.

On March 20, 1974 Rosner submitted, in support of his third new trial motion, an affidavit by Lawrence to this Court which alleged, *inter alia,* that "on numerous . . . occasions Leuci gave me portions of the narcotics seized in cases which I had assisted Leuci" (Lawrence Affidavit, p. 2) and that Lawrence made at least $100,000 through Leuci and had substantial assets during 1971 (*Id.* at 7-8). After March 20, 1974, Leuci told other Assistant United States Attorneys about the March, 1971 undercover tape and helped prepare a transcript, which had not been in existence previously, so that Lawrence could be effectively cross-examined at the hearing on his prior inconsistent recorded statements contained on the tape (H. GX 22) (A. 1253-54).*

In an effort to defuse his considered decision not to call Lawrence as his witness and expose him to questions concerning this tape (and numerous other questions),** Rosner boldly charges by way of *ex post facto* reasoning that the "tape . . . not only contains admissions of crime by Leuci, but also it is in itself direct evidence that Leuci participated in a conspiracy to obtain drugs illegally" (App. Br. 9-10). His assertion is totally devoid of merit.

Judge Bauman found that the passage in the 67 page transcript of the tape set forth above was "open to two interpretations" and "suggestive": on the one hand it did "suggest" that "both Leuci and Lawrence had participated in illegal seizures of narcotics following arrests, and that Lawrence had retained some of the narcotics ('packages') to help meet a continued need for money" (Op. 5); on the other hand, the passage itself "may suggest, as the govern-

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* Defense counsel repeatedly announced in his motion papers and at the hearing his intention to call Lawrence as a witness at the hearing. The March, 1971 recording, portions of which show Lawrence desperate for money and apparently denying that he received narcotics from Leuci, clearly belied the substance of Lawrence's affidavit.

** For example, Lawrence's affidavit does not explain his motivation in coming forward and inculpating himself in criminal conduct.

ment urges, that Lawrence never took drugs while Leuci was making an arrest" (Op. 14).*

Judge Bauman concluded, however, that:

> "even a diligent prosecutor reviewing the conversation could reasonably conclude that the conversation shows no more than a streetwise policeman's familiarity with the manner in which narcotics informants obtain drugs. The tape, in short, does not shriek of Leuci's criminality, and its dubious value could readily have escaped a prosecutor's attention" (Op. 14).

In asking this Court to conclude that the March undercover tape evidences past "admissions" of Leuci's misconduct and/or a conspiracy to obtain drugs (App. Br. 9-10), Rosner would have this Court (1) completely brush aside Judge Bauman's findings to the contrary based in part on Scoppetta's testimony, which the Judge found wholly credible (App. Br. 10, n. 10); (2) extrapolate ambiguous language out of context; (3) believe that Leuci would (a) fully record ** his own alleged admissions and alleged participation in a crime and (b) then dutifully turn the recording thereof over to the Knapp Commission for Mr. Scoppetta's review; (4) believe that Scoppetta, who was familiar with the recording, wrongfully failed to tell Albert Krieger, Esq., Rosner's original counsel, about the March, 1971 "admissions" and was less than candid himself at this hearing when he stated that he told Krieger all the

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* Judge Bauman also thought that the passage itself "may also suggest that on many occasions Lawrence obtained no drugs but on others he did. We now know from Leuci's testimony at the instant hearing that on two occasions he permitted Lawrence to take drugs in the course of an arrest" (Op. 14).

** The recording equipment in the automobile could be turned "on" and "off" at will (A. 1190).

crimes that he knew of (*see* A. 1276-77).* There is no support in the record for any of the conclusions that Rosner would have this Court reach, let alone any reason to conclude that Judge Bauman's findings were "clearly erroneous." Accordingly, Rosner's claim that "Scoppetta came into possession of the tape of Leuci discussing his own illegal narcotics dealings with Lawrence" and "on this record there can be no question . . . [Scoppetta] did possess actual knowledge, pre-trial, of facts establishing Leuci's perjury at trial" (App. Br. 17) completely mischaracterizes and puffs out of all proportion as elsewhere, the "record" now before this Court. While a listener, aware of Leuci's recent revelations, might choose to infer that the tape disclosed an illicit relationship between Leuci and Lawrence, there is simply no basis for faulting Mr. Scoppetta for not suspecting the worst from a tape of Leuci's conversations made by Leuci himself and delivered by him to an agency, investigating police corruption, in the service of which Leuci was a volunteer.

B. The Goe Memorandum

Rosner contends that he is entitled to a new trial because the Government failed to disclose at trial an incident during 1964 or 1965 in which Leuci accepted $50 out of $200 seized by another detective in the course of a search (A. 337-45). Robert Goe and another agent of the Bureau of Narcotics and Dangerous Drugs (BNDD) included this

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* When Mr. Krieger interviewed Mr. Scoppetta prior to trial, Scoppetta, who had listened to the Lawrence tape, told Krieger all about the crimes Leuci had committed, *i.e.*, the ones that Leuci extensively testified about at trial and which Scoppetta believed to be the *full* content of Leuci's prior misconduct. As Scoppetta testified at the hearing, he had no reason to believe that Leuci committed more than four crimes which in and of themselves he considered "sizeable" (A. 629, 636, 1276). As Judge Bauman found, "a prosecutor fully aware of this conversation could reasonably have seen no inconsistencies between it and Leuci's trial testimony" (Op. 16).

incident in a memorandum (the "Goe" memorandum) based on an interview with Leuci, and this memorandum was in the BNDD files at the time of trial.*

It is uncontroverted, however, as Judge Bauman found, that none of the prosecutors who tried the *Rosner* case were aware of either the memorandum or the incident prior to trial (A. 552-53, 879-80). The existence of the memorandum was first discovered by Assistant United States Attorney Sagor on April 9, 1974, subsequent to the filing of Rosner's third new trial motion, and was disclosed to Rosner's counsel prior to the hearing of that motion (Op. 6). Applying the test set forth in *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), Judge Bauman ruled that the Government's failure to disclose the existence of the Goe memorandum was not the result of a decision to suppress evidence and that the evidence was not of such high value that it could not have escaped the prosecutor's attention. He concluded that the failure to disclose the Goe memorandum was inadvertent, that the evidence contained therein was of no value in light of the crimes admitted to by Leuci at trial and that there was no "significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid conviction."** (Op. 12, quoting from *United States* v. *Kahn*,

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* Leuci also informed then Assistant United States Attorney Shaw of the general nature of the incident some time in the Spring of 1971. Shaw left the United States Attorney's Office in July, 1972 to head the Strike Force prior to the *Rosner* trial (A. 747-52). The memo was not physically in the United States Attorney's Office, although Leuci's interview was conducted there. Neither Shaw or Scoppetta had ever seen the actual Goe Memorandum (A. 751).

** Although Rosner did request prior to trial that the Government disclose any evidence of criminal acts committed by Leuci in the past, the failure at this point to unearth the Goe memorandum, which was insignificant in comparison to the dis-

[Footnote continued on following page]

supra, 472 F.2d at 287). See also *United States* v. *Sperling,* Dkt. No. 73-2363 (2d Cir., October 10, 1974), slip op. at 5649.

The inadvertent failure to disclose this piece of information at trial or to correct* Leuci's inadvertent failure** to include the incident in his enumeration of acts of prior misconduct does not even approach the level of significance required to warrant a new trial.

First of all, there was no reason for Mr. Shaw, the Assistant United States Attorney whom Leuci told of the incident recorded in the Goe memorandum, to view that information as exculpatory within the meaning of *Brady* v. *Maryland,* 373 U.S. 83 (1963). The incident described to Mr. Shaw by Leuci was insignificant in comparison with Leuci's admissions of receiving large payments as a go-between for policemen and narcotics suspects, had occurred some seven or eight years previously, was beyond the reach of the statute of limitations and was not the subject of any pending or previous criminal or disciplinary proceeding against Leuci. While this Court has repeatedly criticized prosecutors for not disclosing the existence of *pending indictments* of Government witnesses, *United States* v. *Houle,* 490 F.2d 167, 170-171 (2d Cir. 1973); *United States* v. *Fried,* 486 F.2d 201 (2d Cir. 1973); *United States* v. *Bonanno,* 430 F.2d 1060 (2d Cir.), *cert. denied,* 400 U.S. 964 (1970); *United States* v. *Acarino,* 408 F.2d 512, 515-516

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closures which were made, can hardly be viewed as "deliberate". Leuci had been extensively questioned about his prior crimes in connection with his testimony by Morvillo who was the Government's chief trial counsel (A. 587-88, 550-51; see also 741). Compare App. Br. 15 n. 15.

* Government counsel at trial was in no position, of course, to correct this testimony because they had no knowledge of the "Goe memorandum" or its contents.

** While his failure to mention other acts of misconduct was deliberate, the only reason Leuci did not testify to the $50 incident was because of forgetfulness (A. 383-84).

(2d Cir.), *cert. denied*, 395 U.S. 961 (1969), there is nothing in *Brady* or its progeny that would require the Government to disclose the "Goe incident" as *Brady* material on the facts known to Mr. Shaw. *Moore* v. *Illinois*, 408 U.S. 786 (1972); *United States* v. *Tramunti*, 500 F.2d 1334, 1349 (2d Cir. 1974). It can hardly be said that ". . . the average competent prosecutor would quickly recognize the importance and value of this information to the defense . . .", *United States* v. *Fried, supra*, 486 F.2d at 203, given what the "Goe incident" involved and the far more serious crimes Leuci also admitted.* Of course, the Government's obligation to disclose the "Goe incident" as *Brady* material changed materially after its omission by Leuci from the catalogue of his crimes which the Government elicited on direct examination of Leuci, but, as the record reflects, none of the trial Assistants had any knowledge of the Goe incident. *Compare United States* v. *Sperling, supra*, slip op. at 5649.

However, whether or not the "Goe incident" was *Brady* material, the Goe memorandum, in the files of the BNDD at the time of Rosner's trial, became 3500 material and should have been disclosed once the Government elicited Leuci's prior criminal history on direct examination.**

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* While Rosner is indisputably correct in stating that his pretrial requests repeatedly "flagged" prior instances of misconduct by Leuci, his repeated demands for such material did not of themselves entitle him to have it if *Brady* did not require that.

** Absent this testimony on direct examination, the Goe memorandum would not have been producible under Section 3500. *United States* v. *Pacelli*, 491 F.2d 1108, 1119-1120 (2d Cir. 1974). While statements of a witness disclosing bias are sufficiently related to the "subject matter" of his testimony to warrant disclosure under Section 3500, although collateral to the defendant's guilt, *United States* v. *Borelli*, 336 F.2d 376, 393 (2d Cir. 1964), *cert. denied* as *Cinquegrano* v. *United States*, 379 U.S. 960 (1965), this theft of $50 cannot be said to have suggested an interest on Leuci's part to testify falsely for the Government, though that determination would properly have been one for the trial judge on an *in camera* submission.

But, given Leuci's admissions at Rosner's trial that he secured more than $5,000 from his participation in several shakedowns of narcotics suspects, the significance of his receipt of $50 from a theft would clearly have been *de minimis,* as Judge Bauman found. *United States ex rel. Rohrlich* v. *Fay,* 240 F. Supp. 848 (S.D.N.Y. 1965) (Weinfeld, *J.*).* Given the nature of the "Goe incident" and of the crimes to which Leuci did admit at trial, Judge Bauman's determination below was clearly correct, whether the failure to turn over the Goe memorandum is characterized in *Brady* terms, *e.g., Giglio* v. *United States,* 405 U.S. 150, 154 (1972) or in terms of Rosner's rights under Section 3500, *e.g., United States* v. *Mayersohn,* 452 F.2d 521 (2d Cir. 1971). This is another typical instance in which ". . . a combing of the prosecutors' files [here, the files of another agency] after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." *United States* v. *Keogh,* 391 F.2d 138, 148 (2d Cir. 1968). See also *United States* v. *Gugliaro,* 501 F.2d 68, 72-74 (2d Cir. 1974). Such disclosures do not warrant new trials.**

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* Rosner advances the novel contention that the $50 theft was far more serious than the crimes Leuci admitted at trial because the latter were "victimless", involving the sale of investigative information to willing buyers by willing sellers. Such a distorted ethical judgment could only be derived from a system of values which ignores misconduct undermining the integrity of the system of justice and victimizing the entire public.

** Rosner's argument that the Goe memorandum would have led to other significant impeaching information is without basis. The memorandum itself referred to only this one incident of Leuci's misconduct and the rest dealt with hearsay information he could furnish. There is no evidence that Leuci committed any other crimes with the individuals mentioned in that memorandum. Moreover, Rosner, as Judge Bauman ruled (A. 1122-23), was not entitled to all the details of the Goe incident. *United States* v. *Miles,* 480 F.2d 1215, 1217 (2d Cir. 1973).

2. Alleged Post-Trial Suppression

A. Lawrence's Post-Trial Unsubstantiated Allegations

On January 2, 1973, after the Rosner trial, Charles D. Sherman, Inspector in Charge for the Drug Enforcement Administration, was notified by Frank Rogers, New York City Special Narcotics Prosecutor, that there was an informant, Richard Lawrence ("the Baron"), in his office who had information regarding corruption. Sherman interviewed Lawrence, who told him that he had had numerous narcotics transactions with Leuci. The next day, the United States Attorney directed Sherman to conduct an investigation to determine the truth of the allegations (A. 673-76, 556, 561-62). Sherman then interrogated Lawrence in greater detail and attempted, with the assistance of Special Agent Wolf, to verify his allegations. During the course of subsequent interviews Lawrence mentioned a white male with the first name of "John" who, he claimed, on numerous occasions served as a conduit for transferring drugs and money between the Baron and Leuci. However, the Baron did not know John's last name, his address, his telephone number, or how to contact him and was unwilling to try to find him (A. 678-81, 689). Lawrence also told Sherman that in the summer of 1971 Leuci introduced him to a "John Doe Robert" and told him to deliver a quarter kilo of heroin to Robert, which Lawernce alleged he did. In response to Sherman's request to identify Robert, the only information he could supply was that Robert owned a men's store at an address in Brooklyn. When a member of Sherman's staff attempted to locate this store on the basis of directions supplied by Lawrence, he found it to be nonexistent (A. 681-83). In addition, to the above and other investigative efforts, Lawrence was given a polygraph examination, which, Sherman was in-

formed, indicated that his allegations against Leuci were lies (A. 662-64, H. Gov. Ex. 4).*

On the basis of reports received from Sherman concerning the progress of his investigation, Mr. Morvillo concluded during the week of January 21, 1973 that Lawrence's allegations were without substance and that further investigation was not warranted (A. 564-65, 574). Mr. Morvillo's decision was predicated, among other factors, upon Lawrence's failure of the polygraph examination, Lawrence's inability to corroborate his charges, the fact that his story did not hold together, and Lawrence's demands for substantial money during the course of the investigation. In addition, Mr. Morvillo did not understand there to be any legal obligation to turn over a meritless allegation to the defense under these circumstances (A. 563-66, 569-71, 588, 590, 596-97). Judge Bauman found that Rosner was not in any way prejudiced by the Government's good faith nondisclosure at the time.

Rosner's claim that Mr. Morvillo's failure to inform him of the Baron's unsubstantiated post-trial allegations of Leuci's criminality constitutes prosecutorial misconduct entitling him to a new trial may be quickly dismissed. Whatever the obligations of the Government may be to inform a defendant of evidence discovered after the conclusion of trial, it cannot be broader than the Government's

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* The facts are set forth in greater detail in the Government's affidavit and enclosures of April 9, 1974 which is part of the record of this appeal. Lawrence's polygraph examination of January 17, 1974 (H. Gov. Ex. 4; Ex. "E" Gov. Affd. of April 9) conducted by a reputable former CIA technician (A. 817-25) and submitted to Assistant United States Attorney Morvillo, states *inter alia* that "there were significant emotional disturbances indicative of deception in this subject's polygraph records on the following questions: (b) Have you sold heroin for Leuci more than 25 times between 1968 and January 1972? Answer: Yes.; . . . (e) Have you been instructed to lie about Leuci's involvement with narcotics? Answer: No. . . ."

pre-trial duty to disclose exculpatory material. However, it was the consistent position of the District Judge that the Government was not required to disclose the details of *unsubstantiated* allegations of misconduct made against Leuci (A. 410).* Rosner has already presented his contention to the contrary without any success to both the Court of Appeals and the Supreme Court on his direct appeal which disposed of it without comment.** In light of these rulings and the strong indications that Lawrence, a long-time narcotics informer, was lying, perhaps in order to extort money from the Government (A. 564-65), Morvillo properly concluded that Lawrence's allegations did not constitute evidence to which Rosner was entitled or which would have been useful to him at trial (A. 570-71). There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore* v. *Illinois, supra,* 408 U.S. at 795. This is simply a situation "'. . . in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false.'" *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135, 138 (2d Cir. 1964) (Marshall, C. J.). See also *Giles* v. *Maryland,* 386 U.S. 66, 98 (1967) (Fortas, *J.,* concurring); *United States* v. *Tomaiolo,* 378 F.2d 26, 28 (2d Cir.), *cert. denied,* 389 U.S. 886 (1967).

Although Rosner complains of supposed inadequacies in the investigation conducted under the supervision of Sherman, he did not call Lawrence to testify at the hearing, offer any support whatsoever for Lawrence's allegations that Leuci continually dealt in narcotics with him for

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* Rosner was informed that there were allegations against Leuci, and Leuci was questioned at trial about the fact that there were allegations against him.

** Rosner contended that Judge Bauman erred by refusing to turn over to Rosner at trial allegations of misconduct against Leuci contained in his New York City police file (see Gov. Br. Dir. App. 59-60).

money, or establish through any evidence the value of any of the "leads" he claims Sherman failed to investigate. The only conclusion to be drawn, and one apparently not challenged by Rosner, is that, as Leuci testified (A. 393, 499) Lawrence's allegations that Leuci repeatedly bought and sold narcotics with him were nothing but fabrications. In essence, Rosner's charge, stripped of its rhetoric, is that he should receive a new trial because he has been prejudiced by the Government's failure to disclose unsubstantiated post-trial allegations of misconduct by Leuci which are false. Such a claim contains its own refutation.

B. Disclosure to Solicitor General

Rosner's final and most attenuated claim of post-trial suppression concerns both the adequacy and accuracy of the efforts made by this Office to inform the Solicitor General of newly discovered evidence of Leuci's perjury during the pendency of Rosner's *certiorari* petition. On April 30, 1974, Assistant United States Attorney John D. Gordan, III, the Chief Appellate Attorney, advised Deputy Solicitor General Andrew L. Frey of Detective Leuci's recent admission that he had lied when he testified at the Rosner trial that he had committed no crimes other than the crimes which he admitted (A. 1012-13). Mr. Gordan contacted Mr. Frey after Mr. Sagor forwarded to him a copy of the Solicitor General's memorandum in opposition to Rosner's petition for *certiorari* with the suggestion that the Solicitor General be advised of Leuci's recent admissions of perjury (A. 1034). On May 7, 1974, the Solicitor General wrote the Clerk of the Supreme Court requesting that consideration by the Court of Rosner's petition for *certiorari* be "postponed pending the filing of further memoranda by the parties" (A. 1094; H. GX 21 at p. 4). Thereafter, the Solicitor General filed a Supplemental Memorandum setting forth the fact that during April 1974 Leuci admitted to Assistant United States Attorneys in this office that he had participated in criminal activities beyond

those which he had admitted before and had perjured himself in denying them at Rosner's trial. On June 10, 1974 the Supreme Court denied Rosner's petition for a writ of *certiorari* "without prejudice for the . . . District Court . . . to consider a motion for a new trial." 42 U.S.L.W. 3679.*

Despite the steps taken to inform the Solicitor General of Leuci's admissions of criminal conduct and of his perjury at the Rosner trial, Rosner contends that Assistant United States Attorney Gordan made a "deliberate, calculated, and sustained decision" (App. Br. 80) to keep from the Supreme Court the existence of the Goe memorandum, which Rosner claims would have caused that Court to grant him a new trial even if the revelations of Leuci's perjury at trial concerning additional criminal activity did not. Rosner's claim is plainly belied by the record.

Mr. Gordan saw the Goe memorandum on one occasion in April, 1974, prior to the receipt of the Solicitor General's memorandum in opposition, discussed it briefly with Assistant United States Attorney Sagor, and understood that it would be turned over to Rosner at the time of the hearing on his new trial motion (A. 1040-44, 1090). This was the only time that he and Mr. Sagor discussed the Goe memorandum (A. 1040). In late April, after Leuci had admitted his substantial criminal conduct and thus his perjury at the Rosner trial, Mr. Gordan, at Mr. Sagor's suggestion, brought those facts to the attention of the Solicitor General. Mr. Gordan did not mention the Goe memorandum to the Solicitor General:

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* During May, 1974, Rosner unsuccessfully sought discovery of the details of Leuci's revelation by motion before Judge Bauman and by oral application for a writ of mandamus from this Court, which was heard and denied on May 29, 1974 (Dkt. No. 74-1736). Thereafter, Rosner sought a delay in the action of the Supreme Court on his petition for *certiorari* until after the hearing on the new trial motion but the Supreme Court acted on June 10.

> "I have no recollection—and I have thought about very hard since I learned I was going to testify here—of ever thinking about the Goe memorandum in connection with my communications with the Solicitor General with regard to Leuci's recantations. I cannot say positively that I remember everything I thought of 90 days ago, but I have no recollection of ever having considered the Goe memorandum in connection with my conversations with Mr. Frey" (A. 1087-88).

Mr. Gordan testified that in his view the significance of Leuci's admissions of perjury at the Rosner trial in connection with his additional unrevealed crimes was "in an entirely different category" from Leuci's unwitting failure to include among the crimes he admitted at trial the theft of the $50 referred to in the Goe memorandum (A. 1048), and that he thought the Goe memorandum was of "little significance" in view of what Leuci *had* admitted at the Rosner trial, an opinion Judge Bauman readily expressed at the hearing: ". . . I regard the Goe situation as *de minimis*" (A. 1067). Moreover, in June, 1974, after his attempts to secure the details of Leuci's recantation had failed in the District Court and this Court, counsel for Rosner asked the Solicitor General to agree that Rosner's response to the Solicitor's supplemental memorandum and the Supreme Court's action on Rosner's petition for *certiorari* be delayed until after the District Court's hearing on the new trial motion.* Mr. Gordan knew that the Goe

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* This request highlights the wholly illusory nature of Rosner's assertion that he was deprived of a claimed right to have the Supreme Court, rather than the District Court, decide in the first instance whether Rosner should get a new trial. Rosner apparently preferred to have the District Court make the initial determination of his right to a new trial, and all of the material he claims he was denied was made available to him at that hearing.

memorandum would be disclosed in connection with that hearing but when asked by Deputy Solicitor General Frey what position the United States Attorney's Office took on Rosner's proposed stipulation, he informed Mr. Frey that such an agreement was up to the Solicitor General and took no position on the question, hardly the conduct of someone seeking to hide the Goe memorandum from the Supreme Court (A. 1090-94).*

Rosner asserts that the failure to disclose the existence of the Goe memorandum until the hearing on his new trial motion caused the Supreme Court to act on the basis of deliberate misrepresentations that ". . . there was [no] knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci" (Supp. Mem. 10), since, at the time Leuci failed to mention the crime there recorded, the Goe memorandum was in the files of the BNDD (App. Br. 75-76). Rosner's allegation of misrepresentation is simply baseless.** None of the prosecutors who worked on the Rosner case before, at, or after trial had any knoyledge of the Goe memorandum until it was un-

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* Finally, it is inconceivable that a prosecutor would deliberately suppress evidence that he knew would be furnished immediately thereafter to the defense.

** Moreover, the Solicitor's statements, upon which Rosner places special emphasis, that there had been no knowledge of or participation in Leuci's perjury, were made in the context of allegations in Rosner's third new trial motion papers, which the Solicitor quoted (Supp. Mem. 8, 11), that "the Government has been engaged in a deliberate and massive suppression of evidence . . ." and that there was a secret pre-trial agreement between the Government and Leuci ". . . not to prosecute Leuci for relatively recent and serious crimes in exchange for Leuci's undertaking to make cases against corrupt (or corruptible) participants in the criminal justice system." These outrageous claims were properly denied by the Solicitor General. Apparently Rosner was prepared to seek a new trial on the basis of allegations of Governmental misconduct which he could not support.

covered by Mr. Sagor in early April, 1974.* Second, the Solicitor General's Office did not understand that it had been exhaustively briefed on the factual background of Leuci's admissions and specifically said so in its supplemental memorandum in the Supreme Court (Supp. Mem. 11-12). Third, Rosner's argument misses the crucial point that the Solicitor General's supplemental memorandum was directed to the fact that the United States Attorney's Office had recently obtained admissions from Leuci that he had given *perjured* testimony in denying the many crimes he had just begun to disclose for the first time.** No argument can be made that anyone in the United States Attorney's Office knew that Leuci had perjured himself at the Rosner trial until Leuci's admissions began in April, 1974, or that Leuci's forgetting of the incident in the Goe memorandum establishes perjury by Leuci at Rosner's trial. Leuci's admissions of perjury at the Rosner trial were then, in the Government's view, and continue to be of far greater significance to the Rosner trial than Leuci's unwitting failure to disclose a $50 theft. It was to the admissions of perjured testimony that the United States Attorney's letter to Judge Bauman, Mr. Gordan's communications to the Deputy Solicitor General, and the statements in the Solicitor's supplemental memorandum in the Supreme Court were directed, as their context establishes. Judge Bauman held, rejecting Rosner's claim of suppression in the Supreme Court:

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* Moreover, none of the prosecutors at the trial were aware of the incident recorded in the Goe memorandum, and Mr. Gordan, who alone was responsible for communications with the Solicitor General's Office, did not know that *any* prosecutor had been aware of the "Goe incident" before trial (A. 1069-70). Judge Bauman observed: "I have not seen one iota of evidence in this situation of any improper conduct (A. 1225).

** The Solicitor General's supplemental memorandum in the Supreme Court *begins* with the following statement: "This memorandum is being filed with the Court because recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matters raised by the defense in an effort to impeach his credibility."

> "Again, however, I see no prejudice to Rosner from the government's omission. The incident described in the Goe memorandum was trivial in comparison to the other crimes to which Leuci confessed. His overall confession was brought to the attention of the Supreme Court, and I therefore fail to see how the addition of a single minor item to a list of Leuci's sins could have produced a different result in that Court . . ." (Op. 25).

Rosner's last argument briefly suggests that the Supreme Court, informed of the Goe memorandum, would have reversed his conviction summarily on the principles expressed in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), and that failure to disclose the existence of the Goe memorandum violates a duty imposed by *Mesarosh*. Nothing in *Mesarosh* imposes any special duty on the Government, for it involved ". . . a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General." *United States* v. *Zane*, Dkt. No. 74-1678 (2d Cir., November 4, 1974) slip op. at 231. Moreover, as Judge Bauman noted (Op. 30 n. 18), *Mesarosh* involved the disclosure that a Government witness had perjured himself in other proceedings in accusing innocent persons of Communist activities; the same charge he had leveled at the *Mesarosh* petitioners at their trial. If *Mesarosh* placed any duty on the Government in this case, it was to disclose Leuci's perjury, and this was done, even though, unlike *Mesarosh*, Leuci's perjury was on a matter wholly collateral to Rosner's guilt; however, nothing in *Mesarosh* requires a disclosure in the Supreme Court of the failure to produce 3500 material which would have revealed an insignificant omission in the testimony of a Government witness and which in any event was to be presented to the District Court prior to its hearing of the new trial motion already pending. Rosner's argument that the Supreme Court would have reversed his conviction summarily had it known of the Goe memorandum is refuted by

its denial of *certiorari* in the face of the revelations of Leuci's perjury, the triviality of the Goe memorandum and by remands by the Supreme Court in cases raising potentialities of far more egregious prosecutorial misconduct, *e.g.*, *Ring* v. *United States*, 43 U.S.L.W. 3278 (November 11, 1974). Finally, *Mesarosh* is the law in the Circuit and District Courts of the United States, e.g., *United States* v. *Chisum*, 436 F.2d 645 (9th Cir. 1971), and its benefits, were Rosner entitled to them, would be just as available in the District Court and in this Court as they were in the Supreme Court.

POINT II

Leuci's own knowledge of his prior misconduct is not attributable to the Government.

Apart from Rosner's allegations regarding the incident recorded in the Goe memorandum and the Leuci-Lawrence undercover tape, he does not contend, nor could he, that the Government knew that Leuci testified falsely at trial when he denied committing crimes in addition to those which he admitted to on direct examination.* In an attempt, however, to invoke the more liberal new trial standard applicable to cases where the Government has procured or suppressed knowledge of perjured testimony, Rosner contends that Detective Leuci's own knowledge of the falsity of his denial of any wrongful acts in addition to those which he admitted at trial should be imputed to the Government because he was in its employ. Judge Bauman rejected this argument on the grounds that the perjury of an undercover agent could not be attributed to the Government where the agent did not participate in the investigation or prosecutorial preparation of the case except insofar as he was a witness to the events in question, and where

* It is clear from the hearing record that Leuci consistently denied involvement in additional acts of misconduct in pre-trial and post-trial interviews with federal prosecutors up until April 17 of this year (A. 390-91).

the perjury was unrelated to the issues being tried and went only to the prior misconduct of the agent. He also found, in the alternative, that even if Leuci's perjury is fully attributable to the Government and the applicable standard for evaluating its impact is whether the jury might have reached a different verdict if it had known the full extent of Leuci's prior misconduct, this evidence would have had no such effect on the verdict (Op. 17-20).

It is well established that perjury by a Government witness does not by itself support application of the standards for a new trial required in cases of Governmental misconduct. *United States* v. *Marquez*, 363 F. Supp. 802 (S.D.N.Y. 1973) (Weinfeld, *J.*), *affirmed on the opinion below*, 490 F.2d 1383 (2d Cir. 1974); *United States* v. *DeSapio*, 435 F.2d 272, 286 n. 14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). The fact that the perjurious Government witness happens to be a Government agent does not affect this principle. *See United States* v. *Hester*, 489 F.2d 48, 51 (8th Cir. 1973); *Derringer* v. *United States*, 441 F.2d 1140, 1141-42 (8th Cir. 1971); *Harkins* v. *Perini*, 419 F.2d 468 (6th Cir. 1969); *Holt* v. *United States*, 303 F.2d 791 (8th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963); *Boisen* v. *United States*, 181 F. Supp. 349 (S.D.N.Y. 1960). The cases cited by Rosner below and on appeal in support of his position (App. Br. 18-20; Def. H. Br. at 23) either involve the deliberate suppression of evidence and/or subornation of perjury by police officers in preparation for trial or merely stand for the proposition that under certain circumstances the false testimony of a Government agent central to the issues being tried may result in fundamental unfairness rising to the level of a denial of due process. This is no more than another formulation of the principle governing motions for a new trial in federal cases, that even in the absence of any wrongdoing a new trial will be granted where newly discovered evidence that a witness perjured himself would "probably" have resulted in a

different verdict. But no court has applied the the strict prophylactic sanctions mandated in recent years in prosecutorial misconduct cases such as *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968) to situations, as here, where a Government agent testified falsely on collateral matters without the knowledge of any other members of the Government.

Not only is Rosner's attempt to attribute Leuci's perjury to the Government unsupported by authority, but it would also be unfair and inconsistent with the rationale of decisions setting forth stringent standards for reviewing claims of prosecutorial misconduct. It is difficult to see how the Government could be at fault because of its inability to prevent a witness from lying about facts known only to him and unrelated to the defendant's guilt. While it may be reasonable to hold prosecutors responsible for exculpatory documentary material in the Government's possession of which they are unaware and to impose a duty upon the Government to arrange its affairs in such a way that the prosecutors are acquainted with all relevant documents, it is impossible to conceive how the Government can be expected to enter into the mind of an agent who unilaterally takes it upon himself to lie about matters unrelated to guilt or innocence. As Judge Friendly stated in *Keogh, supra*, "courts must consider . . . the avoidance of impossible burdens on prosecutors . . . ." 391 F.2d at 146.

Moreover, application of the stringent standards reserved for cases of Governmental misconduct to all instances where a Government employee has lied would not serve any deterrent function whatsoever, since the Government cannot prevent witnesses from lying about unrelated matters uniquely within their knowledge. *Cf. United States* v. *Keogh, supra*, 391 F.2d at 148. In the final analysis, there is no reason why the perjury of a Government agent known only to him should stand on a different legal foot-

ing than the perjury of a lay witness called by the Government. This is especially so where, as here, the perjury is totally unrelated to the issues being tried and involves only the prior misconduct of the witness at a time when he was not a Government agent, and where the witness perjured himself not by fabricating incriminating testimony in order to convict the defendant but as a result of his reluctance to expose the full extent of his own wrongdoing to the public and his family (A. 308-09).

POINT III

Judge Bauman properly rejected Rosner's claim that the newly discovered evidence of Leuci's additional crimes would have or might have produced a different verdict.

Since apart from the negligent failure to turn over the Goe memorandum there has been no prosecutorial impropriety in this case, the Government submits that the appropriate standard for evaluating the newly discovered evidence relating to Leuci's prior misconduct is the traditional one of whether it would probably have resulted in a different verdict. *United States* v. *Marquez, supra* 363 F. Supp. at 805-806; *United States* v. *DeSapio, supra,* 435 F.2d at 286 n. 14. Nevertheless, in view of the defendant's repeated allegations of prosecutorial misconduct, *United States ex rel. Rice* v. *Vincent,* 491 F.2d 1326 (2d Cir. 1974), the Government also invited a finding, which Judge Bauman made, under the standard of whether the new evidence "might" have resulted in different verdict.* He found that

* Rosner makes a straw horse argument that Judge Bauman would have applied the "might" standard even "if the government had been fully aware of the massive perjury at the time it was occurring and had coldly calculated to suppress this information from the defense" (App. Br. 31). Judge Bauman im-

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it would not have. It is the Government's position, as Judge Bauman held,* that in light of Leuci's admissions of misconduct at trial, this new evidence does not approach the level of significance required to warrant a new trial under either standard. *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3653 (May 28, 1974).**

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plied no such result when he said "even if Leuci's perjury is fully attributable to the government", he would apply the "might" standard because attributing Leuci's perjury to the government for purposes of the "might" standard, as Judge Bauman did *arguendo*, is not the same thing as saying what action he would take if the Government prosecutors "coldly calculated to suppress."

* Judge Bauman's findings of fact, which Rosner's arguments in the main ignore, are conclusive unless, as they are not, wholly unsupported by the evidence. *United States* v. *Zane*, *supra*, slip op. at 230; *United States* v. *DeSapio*, 456 F.2d 644, 647-648 (2d Cir. 1972); *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

** Rosner also contends that Leuci's perjury entitles him to a new trial pursuant to *Mesarosh* v. *United States*, *supra*, even in the absence of any prosecutorial misconduct and regardless of its impact on the jury. *Mesarosh* was a Smith Act prosecution in which there was compelling evidence that a government witness gave perjurious testimony that went directly to the merit of the charges. The Supreme Court strongly cautioned, however, that newly discovered evidence which is "merely cumulative or impeaching" is ordinarily insufficient to warrant a new trial. 352 U.S. at 9. *See United States* v. *Aguillar*, 387 F.2d 625, 626 (2d Cir. 1967); *cf. United States* v. *Trapnell*, 495 F.2d 22, 25-26 (2d Cir. 1974). As Judge Bauman found, the instant case does not contain any of the unusual, if not unique, features of *Mesarosh*. Rosner's attempt to invoke it reduces to the proposition that a new trial should be granted whenever a Government witness is discovered to have perjured himself. This is not the law. *United States* v. *Zane*, *supra*; *United States* v. *Marquez*, *supra*; *United States* v. *DeSapio*, *supra*, 435 F.2d at 286 n. 14; *Boisen* v. *United States*, *supra*, 181 F. Supp. at 350-51.

A. Leuci's Additional Criminal Conduct Would Not Have Affected The Jury's Assessment Of His Credibility

It should be observed at the outset that Rosner labors under serious misconceptions concerning the uses to which he could have put Leuci's new admissions of additional acts of misconduct. Such evidence could not have been used to attack Leuci's credibility by suggesting that he should not be believed because of his immoral acts. The general rule in Federal Courts, rigorously applied in this Circuit, is that acts of misconduct not resulting in conviction may not be used to impeach a witness' general credibility. *United States* v. *Glasser,* 443 F.2d 994, 1003 (2d Cir.), *cert. denied,* 404 U.S. 854 (1971); *United States* v. *Provoo,* 215 F.2d 531 (2d Cir. 1954). Consequently, the only purpose for which such evidence could been admitted would be the limited one of establishing that Leuci's testimony was motivated by a desire to obtain forgiveness for his acts of misconduct. Although Rosner assumes that *all* of Leuci's additional acts of misconduct would have been admissible, it is well established, that "[a] defendant's right to elicit . . . [evidence of a witness' bias or motive to testify falsely] is not boundless, but is subject to reasonable limitations imposed by the trial judge in the exercise of sound discretion." *United States* v. *Blackwood,* 456 F.2d 526, 530 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972); see also *United States* v. *Kirk,* 496 F.2d 947 (8th Cir. 1974). The test in determining whether to permit the introduction of additional acts of misconduct "is whether the jury was otherwise in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias." *United States* v. *Campbell,* 426 F.2d 547, 550 (2d Cir. 1970). It would have been well within the Court's discretion to exclude evidence of additional misconduct by Leuci upon the grounds that it was cumulative. *See*

United States v. *Miles*, 480 F.2d 1215 (2d Cir. 1973); *United States* v. *Miller*, 478 F.2d 1315, 1318-19 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973). Leuci had already admitted at trial to several extremely serious crimes punishable by long terms of imprisonment for which he did not expect to be prosecuted, and the fact that he had committed additional crimes would have added little to any motive for testifying falsely. In addition, since the Government was unaware of Leuci's additional crimes when he first testified against Rosner, they would not have given Leuci an incentive to testify favorably to the Government.

Moreover, in deciding whether to admit evidence of motive or bias a court must carefully weigh the probative value of such evidence against the dangers that it will be put to an impermissible use. "[T]he question is always whether what it will contribute rationally to a solution is more than matched . . . by the chance that it will divert the jury from the facts which should control their verdict." *United States* v. *Krulewitch*, 145 F.2d 76, 80 (2d Cir. 1944) (L. Hand, *C.J.*); *United States* v. *Bowe*, 360 F.2d 1, 14-15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). If excessive evidence of Leuci's acts had been placed before the jury, there would have been a serious danger that it would have been used to impeach Leuci generally as a witness by conduct not resulting in conviction—an improper use. *See United States* v. *Glasser*, *supra*, 443 F.2d at 1003; *United States* v. *Edelman*, 414 F.2d 539, 541 (2d Cir. 1969); *cf. United States* v. *Kahn*, 472 F.2d 272, 279-80 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). In view of the extremely slight probative value of cumulative evidence of Leuci's misconduct in establishing motive or bias, the likelihood that it would confuse and mislead the jury by focusing its attention on collateral questions, and the danger that the jury would put such evidence to an improper use, it would have been

appropriate for the Court to exclude additional evidence of his misconduct. Courts have frequently rejected evidence of bias and motive under these circumstances. *United States* v. *Campbell, supra,* 426 F.2d at 550-53; *United States* v. *Edelman, supra,* 414 F.2d at 541. *See also United States* v. *Kirk, supra; United States* v. *Maynard,* 476 F.2d 1170, 1174-75 (D.C. Cir. 1973). Finally, even if a trial court chose to admit evidence of some additional acts of misconduct by Leuci, it would have had little impact at all on the jury's assessment of Leuci's interest or bias because of its cumulative nature. *See United States ex rel. Rohrlich* v. *Fay, supra.* It is with these limitations and qualifications in mind that defendant's claim that the newly discovered evidence would have had a significant impact on the jury must be evaluated.

B. Rosner's Conviction Turned Not On Leuci's Testimony But Rather On Their Tape Recorded Conversations And On Rosner's Admissions At Trial

Rosner's claim is that had the jury been apprised of the full extent of Leuci's crimes it would have so affected its assessment of Leuci's credibility on the issue of Rosner's entrapment that it would have acquitted. His argument rests on the totally erroneous factual assumption that the Government's proof of Rosner's predisposition * depended upon Leuci's testimony.** The fact of the matter, as

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* On the counts upon which Rosner was convicted that was the only issue for the jury. Rosner admitted everything else.

** In support of this assertion Rosner cites to a portion of the Government's summation where Rosner claims Mr. Morvillo pointed to a "picture of an honest Leuci" whose credibility alone the Government relied on by saying "not once, not once did Detective Leuci get caught in any lie, because he didn't lie. . . . There was no inconsistency in Detective Leuci's testimony" (App. Br. 11, 35). However, the thrust of what Morvillo told the jury was found in Morvillo's two previous sentences to the jury not

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Judge Bauman found, was that Rosner's guilt was not established by Leuci's uncorroborated testimony, but by substantial other evidence, primarily tape recordings of conversations between Rosner and Leuci and Rosner's own admissions at trial. What follows is the evidence of Rosner's guilt shorn of Leuci's testimony.*

In late September, 1971 Assistant United States Attorney Shaw briefed Detective Leuci with the details of the *Marcone* investigation and asked him to investigate further. Shaw testified that Rosner was never the target of the *Marcone* investigation (Tr. 112, 116, 1208). On September 30, 1971 Leuci met with Lamattina, DeStefano and Marcone. The salient portions of the September 30th meeting with these men are revealed in a comprehensive transcript of a tape of that conversation which was admitted into evidence (GX 25A; A. 11-52). Lamattina told Leuci that he and DeStefano had arranged to fix the Martinez case for a fee of $25,000 which would be given to the arresting detectives. Lamattina further told Leuci that the money had been paid to the detectives, that the charges against Martinez had in fact been dismissed and that he had shared some money with DeStefano for their corrupt endeavor (A. 11-18).

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cited by Rosner: "Whose story was corroborated, Mr. Rosner's or Detective Leuci's? I submit to you that the *tape recordings corroborate Detective Leuci up and down, in and out.* Not once, not once did Detective Leuci get caught in any lie, . . . [etc.]" (A. 175-176) (emphasis added). Judge Bauman noted that "the government's case was based on Leuci's testimony, as corroborated by several tape recordings of conversations in which Leuci and Rosner, among others, participated. Leuci was not the lynchpin of the government's case; the tapes were" (Op. 12). The Government makes no claim that Leuci, however, was "merely peripheral and dispensable" as Rosner would like to argue against (See App. Br. 38 n. 33).

* A more complete summary of the evidence, including that furnished by Leuci, can be found in this Court's opinion on the direct appeal, 485 F.2d at 1215-1219.

During the course of this discussion concerning the *Marcone* investigation, DeStefano broached the "Rosner situation" with Leuci, and asked for Leuci's help (A. 39). See *United States* v. *Rosner, supra,* 485 F.2d at 1216-17. After DeStefano's initial overture to Leuci the case against Rosner began to develop.

In essence, Rosner acknowledged at trial that he paid DeStefano a total of $2,000, which was intended for Detective Leuci and his contact in the United States Attorney's Office. Rosner claimed for his defense that in receiving 3500 and grand jury testimony, giving the bribes and in talking about the Marcone and Stewart situations,* he was entrapped by the pressure placed upon him by DeStefano, Lamattina and Leuci. He principally relied upon his own version of conversations he had with DeStefano and Lamattina. While his version also conflicted in particulars with Leuci's testimony concerning two unrecorded meetings he had with Leuci on October 4 and 8, when Rosner's versions of these unrecorded conversations are considered in the context of two recorded meetings he had with Leuci within the next ten days and other unrebutted evidence, the conclusion is overwhelming "that Rosner was a totally corrupt individual from the outset. Rosner's statements on the tapes were, of course, extraordinarily powerful evidence of his complete willingness to pay bribes and the Government so argued" (Gov. Br. Dir. App. 24, see A. 170-71).

According to Rosner, DeStefano approached him after his meeting with Leuci on September 30 and told him about the possibility that they could get secret information

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* Rosner also denied as a factual matter any illegal involvement in the Marcone and Stewart situations but requested and received an instruction from the Court that his defense was entrapment as to all charges (Court's Charge, Tr. 1388; A. Dir. App. 568).

from the United States Attorney's Office. Rosner told DeStefano that he was not interested in meeting Leuci on October 1 because he did not want to be involved.*

On October 1, Leuci met with DeStefano and Lamattina at the Pub Royal Restaurant in Brooklyn. Surveillance showed that this meeting took place but it was not tape recorded. During the course of the conversation on October 1, Leuci acknowledged (in testimony favorable to Rosner which the latter relied on) that DeStefano told him that Rosner had the case "beat" and was not interested in meeting with Leuci.

On October 2, 1971, Rosner claimed that DeStefano, in an effort to arrange a meeting with Leuci, told Rosner that the Government was taking further action against him. Rosner said that Leuci allegedly told DeStefano on October 1 that (1) Rosner was being investigated for "murder" in connection with the disappearance of Pedro Hernandez; (2) the Government was going to ask for Rosner's "remand" before Judge Metzner, and (3) Rosner was going to be indicted in the "Marcone" investigation (Tr. 835; A. Dir. App. 499). Nonetheless, according to Rosner, he refused to meet with Leuci (A. Dir. App. 500). Rosner characterized his state of mind on October 2 as "very panicky. My head was swimming. I couldn't believe what was going on. The whole thing seemed crazy. I couldn't understand it" (A. Dir. App. 500). On October 4, 1971, when DeStefano asked Rosner to attend the meeting, Rosner agreed to go to find out "exactly what the story was" (A. Dir. App. 504).

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* Rosner made no attempt thereafter to inform any law enforcement authorities concerning DeStefano's corrupt overture to him about getting information from the United States Attorney's Office because he "did not think that any crime had been revealed to [him]" (Tr. 999-1000).

Rosner testified that on October 4, 1971, Lamattina told him, prior to their meeting with Leuci, that Felix Martinez was going to testify against him (A. Dir. App. 506). Later, on October 4, according to Rosner, when he met Leuci for the first time, Leuci himself stated that Rosner was the target of both a "murder" investigation (A. Dir. App. 508) and the *Marcone* investigation (A. Dir. App. 509-10), and that the Government was going to ask for his "remand." Rosner further testified that when Leuci heard Rosner's version of the Rosner I case, Leuci indicated that he "felt sorry" for him and wanted to help him and DeStefano. Rosner then claimed that he (Rosner) only said: "If you hear anything, whatever you hear, let us know" (A. Dir. App. 510-11). Rosner also said that, although he did get up from the table with DeStefano, he denied passing DeStefano money which Leuci said he had later received (Tr. 857-59). Rosner never contacted the United States Attorney or local authorities concerning Leuci and his corrupt contact (Tr. 1017-18).

Rosner testified that on October 8, 1971, DeStefano called him and asked him to join Leuci and Lamattina at a restaurant. Rosner admitted that he read the Rosner I 3500 material Leuci had brought to the restaurant and that he took it away with him (Tr. 868-76). He testified further that he initially refused to pay Leuci, protesting to DeStefano that, "I thought he was doing us a favor. He is your friend. What do you mean, give him something?" (Tr. 869). Rosner further testified that he finally agreed to pay his share of $2,500 because of the "pressure" put on him (Tr. 869-70, 877-79), but he conceded that no pressure was applied to him to read the 3500 material (Tr. 1020-21). He explained his motivation for reading the material as "curiosity," stating that "I wasn't concentrating on the legalities of the situation. I wasn't being a lawyer at that time" (Tr. 1021). Thereafter, according to Rosner, Leuci showed him the *Marcone* indictment, which he admit-

tedly "glanced at" but returned (Tr. 874).* Finally, Rosner

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* Leuci testified that Rosner not only glanced at but kept the *Marcone* indictment. This disputed difference is not material, for it did not lessen, as Rosner claims, his participation in the receipt of "corrupt information" (See App. Br. 47-50). Indeed, Rosner's version of the facts is far more helpful to the Government's position than Leuci's testimony on this point. Rosner claimed, and Leuci denied, that Leuci had told him on October 4 that Rosner was a target of the *Marcone* investigation; Rosner sought at trial to excuse his receipt of information about the *Marcone* investigation thereafter on the ground that it arose from the pressure Leuci's alleged statement put on him. However, Rosner's glancing at, rather than keeping, the *Marcone* indictment was far more consistent with his having an interest in that case arising from something far less compelling than Rosner's claimed fear of being criminally implicated, a fear which Rosner has never shown to have had any basis beyond Leuci's alleged statement. Indeed, Rosner's interest in *Marcone* admittedly preceded his first conversation with Leuci, for Rosner admitted speaking prior to October 4 "with a lawyer from Miami by the name of Gino Nigretti, who told [him] he was representing Mrs. Martinez who had been subpoenaed to appear before the Federal grand jury." Rosner "asked about the case" and claimed he was told that among others "two investigators were going to be indicted" (A. Dir. App. 509-10). DeStefano, Rosner's former investigator, was corruptly involved in the *Marcone* case. *United States* v. *Rosner*, *supra*, 485 F.2d at 1216. On October 12 DeStefano acknowledged to Leuci on tape his (DeStefano's) earlier request of October 6 for the *Marcone* indictment, presumably to see what the evidence might be against him: ". . . I wanted, I wanted Marcone . . ." (A. 55). On October 13th there was a recorded conversation between Leuci, Rosner and DeStefano about the *Marcone* indictment (A. 71). Rosner told Leuci that if he represented Marcone "he'd walk [,] his case is . . . easier", and that "there are no wires in that" (A. 80). In short, it is clear from Rosner's own testimony and other evidence in the case apart from Leuci's testimony that Rosner's interest in the *Marcone* situation did not derive from any threat from Leuci that Rosner was a target of the investigation but rather, as the Government argued to the jury at trial: "DeStefano was Rosner's buddy, and you can bet that Rosner was helping his friend DeStefano . . ." (A. 158).

testified that after he agreed to pay, Leuci told him that his contact was doing everything he could for Rosner. Rosner asked, "What is he going to do?" Leuci then allegedly volunteered: "He is going to get you whatever information he can. He is going to get you the grand jury minutes" as part of it (Tr. 871, 878-79).

On October 12, 1971, Rosner admittedly gave DeStefano $1,250 in cash (Tr. 881-82), claiming that this was for grand jury minutes (Tr. 884).* Leuci met with DeStefano alone later that day, and received $1,150 cash from him. This meeting was tape recorded. The tape recording of October 12th between Leuci and DeStefano showed Leuci resisting attempts by DeStefano and Rosner to get the minutes (GX 26a, A. 52-66).

On October 13, 1971, Leuci recorded an extensive conversation between Rosner and DeStefano. This is the first recorded conversation that Leuci had with Rosner, and it is a death blow to Rosner's entrapment defense.** Prior to Rosner's arrival, DeStefano asked Leuci about "Stew-

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* But see A. 73 (top), the taped conversation of October 13th, where Rosner negotiated with Leuci about the price (*e.g.*, A. 73-76) and whether Rosner would in fact purchase the Grand Jury minutes in the first place.

** Rosner claims that the Government recognized in connection with the direct appeal "that this evidence alone [the tape recordings] was not sufficient to dispose of Rosner's entrapment dedense, since the tape conversation occurred *after* (emphasis in the original) Rosner claimed his entrapment had occurred" (App. Br. 43). The Government acknowledged no such limited use of the tape recordings before this court in the direct appeal: ". . . Rosner was a totally corrupt individual from the *outset*. Rosner's statements on the tapes, were, of course, extraordinarily powerful evidence of his complete willingness to pay bribes. . . ." (Gov. Br. Dir. App. 24). Though the recordings were "later" they undoubtedly showed what kind of person Rosner was but a few days earlier.

art," * "If they've got him . . . *we've* gotta know" (emphasis added). Leuci understood DeStefano's message; Leuci replied, "I know just what you want, I know just what you want! Find their number one rat. Alright" (GX 27a, A. 67). After the conversation about Stewart, Rosner appeared and there followed a discussion first concerning Marcone (A. 71) and then at length concerning the grand jury testimony. Leuci resisted time after time Rosner's requests to turn over such statements, adding that his contact told him that eventually they would be turned over. Indeed, at one point Leuci cautioned Rosner concerning the serious illegality of obtaining Grand Jury minutes. Leuci said, ". . . you're talking about something that the mere possession of that, is like he gets pinched, five on the spot . . ." (GX 27a, A. 72). Rosner's eagerness is illustrated by the following statement a few moments later (GX 27a, A. 74):

> "Det. Leuci: All things being equal, personally, I don't know how you feel about this, but personally, you don't have to, you don't have to. You want the Grand Jury minutes only as icing on the thing for yourself, if you want if you want to spend another fifteen hundred dollars, a thousand dollars, to pay for the Grand Jury minutes, which you really don't need, I'll leave it up to you. But that's what it's going to be. It's not, what I say, you know."

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* On that very day, a narcotics indictment was filed in this District naming Bynum, Cordovano and sixteen others as defendants (Tr. 647, 649, 651; GX 23A) *United States* v. *Bynum, supra.* According to former Assistant United States Attorney Updike, Stewart had in fact testified in the grand jury in connection with the *Bynum* case (Tr. 647). In April 1971, when Stewart, Cordovano, and Bynum had been arrested, Rosner represented both Stewart and Cordovano before the Magistrate (Tr. 645-46). After July 4, 1971, Stewart was "physically relocated by the Government outside of New York State," and his whereabouts were a secret (Tr. 653).

Rosner then said, "It's worth it" (GX 27a, A. 74).*

The three agreed on a price of $1,500 for the minutes. Rosner asked Leuci, "How long will it take him to get them?" Rosner emphasized that, "We'll get them as a matter of right anyway. So with us it's just a matter of time, and we're paying a lot of money for nothing" (A. 78).

Leuci saw Rosner hand DeStefano a sum of money; thereafter DeStefano paid Leuci $850 in the men's room of the restaurant.** Out of Rosner's presence, Leuci asked

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* Rosner, realizing the damning nature of this tape recording, disputed that the recording says, "It's worth it"; he claimed, rather that he said, "I don't think it's worth it."

In addition, many of the disputed versions (*e.g.*, A. 72-75, 80) of the tape recordings also illustrate how devastating the Government's taped versions of parts of the conversation were to Rosner's predisposition defense. For example, Rosner admitted on cross-examination that he was present while Leuci and DeStefano were talking about one Quinones (See Gov. Br. Dir. App. 18, footnote). Rosner testified that Leuci and DeStefano were discussing a "corrupt agreement" to get leniency for Quinones, a defendant in a New York State narcotics case by giving him credit for making cases as an informant when he, in fact, had not made such cases (Tr. 1138-47). Although Rosner denied any participation in the discussion, the transcript showed Rosner "*laughing*" while saying, "Listen, I don't know what's happening, but I'm listening" (Tr. 1143; GX 27a, A. 87). Rosner disputed the Government's version. He claimed that he was not "laughing" (See GX 27a, A. 87), and his version of the transcript omits the word "laughing". Judge Bauman noted at sentencing that Rosner sat "listening" to "matters which reeked of illegality" and "occasionally participate[d] as if the subject were the price of hamburger" (A. Dir. App. 655-56).

Rosner's interpretations of the tape recordings are tortured and absurd. We would welcome an opportunity to transmit the entire tape recordings of these meetings to this Court for review.

** The tape recording reflects the $850 payment as "four fifty" and "four" (see GX 27a, A. 97).

DeStefano on the recording whether he could guarantee that Stewart would not be killed if Leuci gave DeStefano information about Stewart's status and whereabouts. DeStefano refused to give Leuci such a guarantee, claiming that Stewart was a "bad guy" who was going to "hurt a lot of people" (GX 27, A. 97-99).

The defense tried mightily, but vainly, to disassociate itself from the October 13 tape recording. Rosner claimed that when Leuci asked for an additional price of $1,500 on the 13th for the grand jury minutes, he tried to change the subject. Rosner claimed that Leuci kept "pressuring" him, stating, "what's more important, money or the case", and "what are you, tight or something?" (Tr. 884-85, 1069). Rosner further claimed that as a result of this "pressure" he agreed to make the extra payments (Tr. 885). However, the tape recording of the conversation simply reflects no such comments (A. 67-101).

The tape of October 15, 1971 equally put the lie to Rosner's entrapment defense. On this date Rosner met with DeStefano and Leuci. Leuci informed Rosner that he had not been able to obtain the grand jury testimony, but he believed that he would be able to furnish it within a few days. Rosner agreed to that, and asked Leuci questions about the availability and status of witnesses in the Rosner I case (See GX 28a, A. 103-08). At one point he asked Leuci to get him Pulido's "yellow sheet" (A. 106). During the meeting on the 15th, there was further discussion about George Stewart. DeStefano reminded Rosner that the Stewart matter had been discussed with Leuci: "The other thing was an important thing to me, too . . . No, the thing I told you about, we're talking about Stewart, Eddie" (GX 28a, A. 109). Leuci informed Rosner that he had been unable to find out anything about Stewart, even through a federal contact of his at BNDD who examined records at "90 Church Street" (GX 28a, A. 110-11).

Rosner asked Leuci to get in touch with his BNDD contact and to have him *"take another peek"* (GX 28a, p. 11, A. 111) (emphasis supplied).*

Similarly the defense tried vainly to disassociate itself from the October 15th tape recording. In trying to explain away the conversation that day regarding Stewart, Rosner testified that since Stewart failed to appear for a Court appearance in June or July 1971, Rosner considered Stewart a "fugitive" (Tr. 903-04). Rosner said that DeStefano came to him to ask if he had any idea where Stewart could be located (Tr. 904), since DeStefano allegedly was going to "take him into custody and turn him over to the Government to save the house [the collateral put up by Stewart's uncle Cordovano for his bail] from being forfeited . . ." (Tr. 906). But on cross-examination, when confronted with the records of the court proceedings involving Stewart, Rosner had to agree that there had never been an application for forfeiture of Stewart's bail (Tr. 1105-08). He then changed his story and admitted for the first time that DeStefano had asked him whether Stewart was an "informant" (Tr. 1110). Moreover, he admitted that DeStefano had asked about Stewart's possible co-operation because DeStefano was trying to acquire cross-examination material on Stewart in the upcoming *Bynum* case (Tr. 1110-16). Rosner conceded that he was not pressured into having a discussion with Leuci on the 15th regarding Stewart, but did it, to use his words, because he "was being a nice guy" (Tr. 1115-16).** Rosner also admitted that he could not point to any part of the taped conversation of October 15th where Leuci "pressured" him to discuss the witnesses and the evidence in the Rosner I case (Tr. 1075).

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* In the Gov[illegible]er's Appendix of the transcripts in evi[illegible]cord transmi[illegible]ed to this Court, Rosner's [illegible] other peek" is illegible (A. 111, GX 28a[illegible]

** Rosner's [illegible]hat he "was at most an observer of and not a parti[illegible] the Stewart matter" (App. Br. 42 n. 37) is preposterou[illegible] light of his prior testimony and the recording.

On October 18th Rosner admittedly received the grand jury minutes from DeStefano (Tr. 911), and on October 19th Rosner testified that he gave DeStefano $750 cash, the money that he "owed him on the grand jury minutes" (apparently half of the $1,500) (Tr. 910).

At the heart of Rosner's motion for a new trial is his contention that Leuci lied as to the facts of *unrecorded* conversations between himself and Rosner, that Leuci was "motivated" to lie about such conversations in order to "guarantee against eventual prosecution for his numerous crimes" * by presumably effecting a conviction for the Government, and that the non-recorded conversations were (a) crucial to the Government's case, (b) crucial to Rosners' entrapment defense, and (c) cast a completely "different light on the recorded conversations" (App. Br. 50). The major fallacy of Rosner's argument of lack of predisposition—his only defense—is that the evidence that Rosner was ready, willing and able to commit the crimes charged was irrefutable and did not depend in any way on any uncorroborated conversations he had with Leuci.

The tape recordings of October 13th and 15th did not show a lawyer who was "panicky" or whose "head was

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* Leuci agreed freely to engage in the dangerous investigation without any threat of prosecution or future fear thereof (A. 334-35). Rosner's theory of motive is that "Leuci's . . . value to government was his best guarantee against eventual prosecution for his numerous crimes" (App. Br. 22). This theory is unpersuasive. If Leuci really feared "eventual prosecution," which he testified he did not, he would not have volunteered for an undercover assignment and have situated himself close to government investigators. Furthermore, since Leuci's misconduct was *not* known to the government, it would not have given Leuci any additional incentive or "motive" to testify favorably to the Government. At any rate, notwithstanding Leuci's lack of "motive" to lie about the unrecorded conversations, these unrecorded conversations—as the main text makes clear—were not crucial to the Government's case.

swimming", as Rosner claimed he was at all times by way of defense. They evidence, rather, the actions of a calculating professional who: (a) insisted on receiving the Grand Jury minutes; (b) haggled over the price of the minutes; (c) laughingly * participated in a corrupt conversation concerning the *Quinones* case (p. 43, footnote, *supra*); and (d) told Leuci to get information about Stewart, a relocated witness. These two recordings themselves proved beyond any shadow of a doubt Rosner was ready, willing and able to commit the offenses he admitted.**

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* The recordings themselves in tone and inflection support these statements, as does the "cold" transcript of the recordings, GX 27a and 28a (A. 67-119); see Op. 20.

** Rosner's alleged "defense" was bottomed on his incredible allegation that he was entrapped by his co-conspirators and Leuci, that he was told by DeStefano on September 30, October 2, and 4 and by Leuci on the 4th that he was going to be "remanded", indicted in the "Marcone" investigation, and investigated for the "murder" of Hernandez who was missing. Rosner claimed that he met with Leuci on the 4th to find out "exactly what the story was" (Tr. 842). However, even assuming *arguendo* he was told these things by DeStefano and/or Leuci, Rosner's supposed need for information concerning "murder, remand and Marcone" bore absolutely *no* relation to the "stories" he illegally purchased and for which he was convicted, *i.e.*, the 3500 material and grand jury testimony of Hernandez, Pulido and Beltran underlying the *1970* Rosner I indictment. To illustrate, Rosner's purchase of Hernandez' 1970 3500 material had nothing at all to do with the alleged October 1972 pending "remand," the alleged murder investigation involving Hernandez or the "Marcone" investigation. Similarly, the Pulido and Beltran statements which Rosner bought could not conceivably provide Rosner with any answers to "murder, remand and Marcone." And finally, "murder, remand and Marcone" was no defense to his trying to obtain secret information involving Stewart as charged in Count One (Court's Charge, A. Dir. App. 533).

The Government's position is that Rosner's assertion that Leuci told him in the unrecorded conversations about his being the subject of a "murder investigation," a "remand" and the

[Footnote continued on following page]

In sum, this Court can find at least five important areas of predisposition evidence based on recordings and conceded facts which were presented at trial: (1) the tapes of October 13th and 15th; (2) Rosner's admissions *; (3) Rosner's false exculpatory statements **; (4) his un-

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"Marcone" investigation did not take place. First, and foremost the recorded conversations evidence no such claims; and the Government so argued strongly in summation, *i.e.*, if these things were really said by Leuci a few days before, "wouldn't he [Rosner] ask on the 13th, the 15th, the 19th [when Rosner was also recorded], about that?" (See A. 168-69). Second, Leuci was not so instructed by the United States Attorney's Office (Tr. 1208, 1297, 1314-15). Third, Rosner's testimony as to the alleged pressures put on him by DeStefano and Lamattina when Leuci was not present on September 30, October 2 and 4 could not be directly controverted since Lamattina and DeStefano did not testify.

* Rosner's admissions relate not only to making payments, talking about Marcone and Stewart, *i.e.*, the facts of the underlying offenses, but also to facts showing his predisposition. For example, Rosner's own version of the events of October 8th (pp. 39-41, *supra*) conflicts with any claim of entrapment and evidenced his being not only ready but eager to commit obstruction of justice regarding the receipt of 3500 material and grand jury testimony. See also A. Dir. App. 509-10, Tr. 1089-92, A. 150-51, where Rosner admitted to talking *prior* to October 4 when he first met Leuci to a defense attorney on his own at a New York hotel about facts of the then pending *Marcone* grand jury investigation.

** The first Leuci-Rosner recording on the 13th as well as the one on the 15th do not reflect Rosner's "murder, remand, Marcone" refrain. See footnote above. This was not the only instance at trial where defendant's credibility was controverted. Rosner lied about the length of his service with the Legal Aid Society (Tr. 1164-67, 1334), the "coincidence" of his reviewing the *Reardon* case prior to trial (Tr. 1003-04, 1312), the reason he did not file appellate briefs in the *Hernandez* case (Tr. 1294), the reason he wanted information on Stewart (p. 45, *supra*) his explanation that being able to "talk" to Det. Reed referred to sociability, not venality, the disputed versions of the tape (Tr. 1334, 1161-62; A. 93-94), as well as other matters.

convincing demeanor * while claiming he was entrapped; (5) the Stewart", *"Quinones"* and Marcone situations.**

These five categories of predisposition show that it was simply Rosner's corrupt nature from the outset which caused him to commit the offenses. Even assuming *arguendo* his contention that the unrecorded conversation of October 4, 1971 with Leuci's concerned "murder, remand, and Marcone", it could not have rationally motivated Rosner to purchase the Grand Jury testimony underlying his then pending 1970 indictment (see p. 47, footnote *supra*). In any event, when Rosner's version of the unrecorded conversations is considered in the context of this irrefutable evidence, the conclusion is overwhelming that he was predisposed from the beginning to commit the crimes charged.

Nothing in Rosner's acquittals on Counts Four and Five is inconsistent with the jury's rejection of the entrapment defense. In connection with the October 4th bribe, Rosner denied ever giving DeStefano money on that night and was not present on the 8th at the time Leuci allegedly received $100 from DeStefano. The acquittal resulted from the fact that, as compared to the other bribes, the Government, as was said previously "had no tape recordings to corroborate Leuci's testimony" to the contrary (Gov. Br. Dir. App. 25 fn.). As observed previously herein, Leuci was an admittedly corrupt police officer who was extensively cross-examined and confronted with the fact that there had been several allegations against

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* In his opinion of March 15, 1973, relating to the second new trial motion, Judge Bauman said Rosner's trial testimony was "to put it kindly utterly incredible" (Opinion of March 15, 1973, p. 9, A. Dir. App. 1056).

** This Court noted Rosner's involvement in the *Bynum* case involving Stewart and commented, "That Rosner desired corrupt information in a number of cases tends further to establish his predisposition to obtain such information by unlawful means." *United States* v. *Rosner*, *supra*, 485 F.2d at 1222.

him. In summation defense counsel told the jury that the "tapes are much better . . . than Detective Leuci's testimony" (Tr. 1248), that most of his defense was even in Leuci's testimony "on the Government's side of the case" (Tr. 1285) and that Leuci was an expert in "blackmail" (Tr. 1249). In his opening defense counsel called Leuci "corruption himself" (Tr. 100). As the acquittals on Counts Four and Five confirm, the jury never relied upon Leuci's uncorroborated testimony. Further impeachment of Leuci with his newly discovered crimes would accordingly not have affected Rosner's conviction on the counts on which Leuci's testimony was corroborated both by tape recordings and Rosner's own admissions. See *United States* v. *Sperling, supra,* slip op. at 5653-5654; *United States* v. *Gugliaro, supra,* 501 F.2d at 73-74; *United States* v. *Pfingst supra,* 490 F.2d at 276.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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